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Issue date: 21May2001

CASE NO.: 1998-LHC-01026
1998-LHC-01027

OWCP NO.: 06-152420
06-167210

In the Matter of:

JOHN NETTER
Claimant

v.

INGALLS SHIPBUILDING, INC.
Employer

DECISION AND ORDER UPON REMAND
FROM THE BENEFITS REVIEW BOARD AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act") and the regulations promulgated thereunder.

Background

Claimant, an electric cable puller, sustained a work-related injury to his right elbow on March 9, 1993, and again on August 16, 1995. In my Decision and Order of January 6, 1999, I found that the Claimant could not return to his usual work following the second injury, and thus awarded the Claimant temporary total disability benefits from August 16, 1995, to November, 15, 1996, the date that I found the Claimant's condition became permanent. In addition, I awarded the Claimant permanent total disability from November 16, 1996, until July 30, 1998, the dated that I found that the employer established the availability of suitable alternate employment. I further found that the Claimant sustained a 28 percent impairment to his upper right extremity, 18 percent of which was caused by the August 16, 1995, accident. I therefore awarded the Claimant permanent partial disability benefits

under the schedule set forth at 33 U.S.C. § 908(c)(1). I awarded to Claimant's counsel an attorney's fee of $4,925.00.

Employer appealed the Decision and Order Awarding Benefits as well as my March 18, 1999, Order Denying the Employer's Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney Fees. Specifically, the Employer challenged my finding that the Employer failed to establish suitable alternate employment until July 31, 1998, and argued that the Employer established suitable alternate employment as of February 1997. The Benefits Review Board ("Board") agreed with the Employer, and vacated my finding that suitable alternate employment was not established until July 31, 1998. BRB slip op. at 3. The Board disagreed with my reliance on the Claimant's treating physician's approval of the identified work in determining the alternate employment date as July 31, 1998. BRB slip op. at 3. The Board remanded this case and specifically directed me to consider whether positions found by the Employer's vocational consultant prior to July 30, 1998, are suitable, given the Claimant's physical restrictions and other vocational factors. BRB slip op. at 3, *citing Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1988). Furthermore, the Board found that the Employer's March 2, 1999, objections to the Claimant's amended petition for attorney fees was timely filed, and thus the Board directed me to consider these objections. BRB slip op. at 4, *citing Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998).

A. Suitable Alternate Employment

I previously found that the Claimant established a *prima facie* case of total disability, thereby shifting the burden to the Employer to establish suitable alternate employment, if at all, after the Claimant's August 16, 1995, accident. *See Lousiana Ins.. Guar. Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994): *Palumbo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991). The Employer must show the existence of realistically available job opportunities within the geographical area where the Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041 (5th Cir. 1981). The ALJ must resolve whether the alternate positions identified by the Employer are within the restrictions on the Claimant's employability, as determined by the ALJ in consideration of the evidence of record. BRB slip op. at 3, *citing Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1988). If the Employer meets its burden and shows suitable alternative employment, the burden shifts back to the Claimant to prove he was unable to attain the suitable alternative employment despite a diligent search and willingness to work. *See Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). If the Claimant fails to meet this burden, then at the most his disability is partial, not total. *See* 33 U.S.C. §§ 908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Since the accidents that form the bases of these claims occurred in Mississippi, the rulings of the United States Court of Appeals for the Fifth Circuit are germane to this matter.

The Board found that I had committed an error of fact in finding that, due to Dr. Crotwell's reservations regarding the suggested security position, the Employer had not established suitable

alternate employment until July 31, 1998. BRB slip op. at 3. The Board stated that the evidence of record shows that on both April 28, 1997, and May 22, 1997, Dr. Crotwell approved guard duty so long as the work was "within the restrictions that have been outlined." (EX 6 at 27-28). The Board further stated that the Claimant's treating physician need not be asked whether specific employment opportunities were indeed suitable for the Claimant. BRB slip op. at 3. Instead, the Board found that the ALJ must to determine whether the suggested employment is within the Claimant's given physical restrictions and vocational profile. BRB slip op. at 3.

The Fifth Circuit has established a two-prong analysis for determining whether the Employer has established suitable alternative employment for the Claimant. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042 (5th Cir. 1981). First, I must determine the range of the Claimant's work capabilities in consideration of his age, education, work experience, injury and subsequent physical restrictions. *Id.* Second, I must determine whether the Employer established the existence of job opportunities reasonably available within the geographical area in which the Claimant resides, and within the Claimant's capabilities, as determined in the first prong. *Id.* The Claimant must be able to compete for and be likely to secure the alternative jobs proposed by the Employer. Pursuant to the Board's directive, I will reconsider the evidence of record regarding the Claimant's physical restrictions and the proposed alternative jobs to determine the date on which the Claimant's disability changed from total to partial.

1. Physical Restrictions

On September 23, 1996, the Claimant underwent a functional capacity evaluation at the Springhill Memorial Hospital Rehabilitation Institute. (EX 9). It was determined that the Claimant could occasionally lift and carry 15-20 pounds, and frequently lift and carry 10 pounds, but not without experiencing pain. (EX 9). Additionally, the Claimant could not climb safely. (EX 9). The study established that the Claimant's walking, standing, and sitting abilities were normal, but tasks using his right elbow should be limited to less than 10% of his work. (EX 9). Overall, the evaluation determined that the Claimant should be limited to light duty work within the above lifting restrictions. (EX 9).

This evaluation was echoed by the subsequent reports of Dr. Crotwell, who is Board Certified in orthopaedic surgery. (CXB 2; EX 6, 12). Under Dr. Crotwell's care, the Claimant underwent three surgeries on his elbow, the last of which was performed on May 13, 1996. (CXB 2; EX 6, 12). As of October 7, 1996, Dr. Crotwell permitted the Claimant to return to light duty work, with the following restrictions: 15 lbs. of infrequent lifting; 10 lbs. of frequent lifting; and prohibitions on ladder climbing and shoulder and repetitive right arm work. (EX 6 at 25-26). In addition, Dr. Crotwell found the Claimant had reached maximum medical improvement as of November 15, 1996. (EX 6 at 25-26).

In his June 13, 1997, report, Dr. Rutledge explained that his examination of the Claimant revealed that the Claimant could not return to his welding position, but could "probably do more than a 15 to 20 pound lifting job. (CXB 4). In my Decision and Order of January 6, 1999, I found that this statement is equivocal, and thus I defined the Claimant's lifting restrictions according to those outlined by Dr. Crotwell and supported by the September 23, 1996, functional capacities evaluation. After

reviewing the evidence of record on remand, I find that Dr. Crotwell's assessment of the Claimant's physical restrictions are persuasive, and define the Claimant's physical restrictions accordingly.

2. Alternate Positions

In determining the existence of suitable alternate employment, I may rely on testimony of vocational counselors if the opinion is informed of the Claimant's age, education, industrial history and physical limitations when recommending alternate jobs. *See Hogan v. Schiavone Terminal*, 23 BRBS 290 (1990). Positions identified by the vocational counselor, however, do not constitute suitable alternate employment when there is doubt as to whether the employee could perform the jobs due to his physical restrictions. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991). In determining whether the Employer has established alternative employment within the Claimant's physical restrictions, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the Board advised, it is within my discretion to consider and assign appropriate weight to the opinion of a credited physician in light of vocational counselors' employment recommendations. BRB slip op. at 3.

Consistently, the Board has held that total disability becomes partial on the earliest date that the employer establishes suitable alternate employment after the Claimant reaches maximum medical improvement. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). As previously stated, the Claimant reached maximum medical improvement on November 15, 1996. (EX 6 at 25-26). The record contains vocational rehabilitation reports by Robert Walker, Jr. , M. Ed., C.R.C., and Tommy Sanders, C.R.C. (EX 13). Mr. Walker's first report of July 25, 1996, reflected positions available prior to the Claimant reaching maximum medical improvement, and thus have no bearing on the determination of the date on which the Employer established suitable alternative employment. (EX 13). As of December 15, 1997, Mr. Walker also referred the Claimant for jobs involving customer service, housekeeping, security guard, equipment operator, auto parts sorter, valet parking attendant, and cafeteria aide. As of February 10, 1998, Mr. Walker investigated and approved of six positions for the Claimant, including equipment operator, mail distribution clerk, meter reader, and clerical jobs. My review the aforementioned positions revealed that , most descriptions fail to indicate the physical requirements of these positions, thereby obviating an evaluation of whether the positions were suitable alternatives for someone with the Claimant's physical restrictions. Moreover, I find that many of the job summaries insufficiently described the required hours, salary, and tasks of the recommended positions. Therefore, I find that Mr. Walker's reports are insufficient to satisfy the Employer's burden regarding suitable alternative employment for the Claimant.

As early as February 11, 1997, Tommy Sanders, C.R.C., issued a vocational evaluation of the Claimant that identified prospective positions as either a cashier or security guard. (EX 14 at 2-3). In my January 6, 1999, Decision and Order, I found that Mr. Sanders's recommendations were made in consideration of the Claimant's injury, physical restrictions, employment background, and education.

Of those positions, Dr. Crotwell opined on April 28, 1997, that the Claimant could not perform cashier work, but security work was possible provided it conformed to the above restrictions. (EX 6 at 27). I noted in my previous opinion, however, that Dr. Crotwell qualified this general approval with reservations regarding the specific guard position description provided to him for evaluation. In my Decision and Order of January 6, 1999, I found that Dr. Crotwell's reservations were probative of whether the recommended jobs were reasonably within the Claimant's physical restrictions, and thus determined that all of the aforementioned jobs failed the Fifth Circuit's standards established in *Turner*. *See Turner*, 661 F.2d at 1043. Thus, I found that the Employer had not established suitable alternate employment through the February, 1997, recommendations of Mr. Sanders.

Subsequently, Mr. Sanders completed the May 19, 1997 Labor Market Survey that updated his original recommendation of security guard work with information regarding six full-time security guard positions with Swetman Security, and one security guard position with Gulf Coast Security. (EX 14 at 5). Again on May 22, 1997, Dr. Crotwell repeated his general approval of the Claimant working as a security guard by writing, "okayed [a job description] for guard duty as long as it fell within [the Claimant's] restrictions." (EX 6 at 28). Finally, Mr. Sanders recommended the Claimant for a fuel booth cashier position as well as three security guard jobs on or about July 9, 1998. (EX 14). In addition, Mr. Sanders's July 31, 1998 report also referred the Claimant for two security guard positions as well as a cashier job. On or about July 16, 1998, Dr. Crotwell signed a form unequivocally indicating that the Claimant could work as a security guard, fuel booth attendant, and gate security. (EX 14 at 7-9). Accordingly, in my Decision and Order of January 6, 1999, I found that the Employer established suitable alternative employment as of July 31, 1998.

In reviewing the evidence of record on remand, however, it is clear to me that the July 31,1998, calculation is incorrect. In reviewing Mr. Sander's February 11, 1997, report, it is apparent that in making his recommendations, he considered the Claimant's age, education, work history and medical restrictions defined by Dr. Crotwell. (EX 14). In fact, Mr. Sanders defines the Claimant's medical restrictions exactly as outlined by Dr. Crotwell, and discusses the Claimant's medical history at length. (EX 14 at 1-2). Mr. Sanders recommended security guard positions available with two different companies, Gulf Coast Security and Seven Oaks Gulf Hills. The duties of these jobs including walking rounds, punching a clock, logging visitors in and out of the facility, and transferring phone calls. Mr. Sanders contacted both companies, and found both to be receptive to considering the Claimant for current employment based on his profile. (EX 14 at 2). Overall, I find that both jobs require light physical exertion, and are within the Claimant's physical restrictions as determined by Dr. Crotwell.

In his notes of April 28, 1997, Dr. Crotwell stated that the Claimant and he discussed the job descriptions for cashier and security guard positions as recommended by Mr. Sanders in February 1997. (EX 6 at 27). Dr. Crotwell stated that "[g]uard duty is a possibility as long as they fall within the restrictions that have been outlined." (EX 6 at 27). While it is within the ALJ's discretion to determine the suitability of recommended positions based on the opinion of a credited physician, the Claimant's treating physician need not specifically approve a job where the job recommended is within the physical

restrictions that the treating physician imposed for suitable work. *See generally Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996). However, as it appears that Dr. Crotwell does not disapprove of the guard position, the treating physician does not offer an opinion contrary to the February 11, 1997, recommendations of Mr. Sanders. (EX 6; EX 14). As such, the evidence of record reveals that the Employer established suitable alternative employment as of February 11, 1997.

Furthermore, I find that the Claimant cannot prove that he was unable to attain the suitable alternative employment despite a diligent search and willingness to work. *See Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). The Claimant testified that he was made aware of Mr. Sander's February 1997 report, and that he attempted to contact all of the employers listed in this vocational report. The Claimant also met with Dr. Crotwell in April 1997 to discuss the job descriptions, whereupon Dr. Crotwell approved the security guard jobs, but not the cashier position, as within the Claimant's physical restrictions. (EX 6 at 27). Yet, as I found in my January 6, 1999, Decision and Order, the Claimant's testimony establishes that although he would accept security work, he found the wages for such security positions to be unacceptable. (TR 52, 76). As I found before, the Claimant's testimony regarding his efforts to procure these positions lacks the requisite degree of specificity to satisfy his burden. Overall, the evidence of record establishes that the Claimant can perform the security work as detailed in Mr. Sander's February 11, 1997, report, and with diligence, the security positions appear reasonably attainable. Therefore, I find Claimant's disability became partial on February 12, 1997.

B. Claimant's Petition for Attorney Fees and Employer's Objections Thereto

The Board vacated my March 18, 1999, Supplemental Order that awarded to the Claimant's counsel the requested fee of $4,925.00, and specifically directed me to consider the Employer's March 2, 1999, objections to the Claimant's counsel's amended fee petition dated February 19, 1999. BRB slip op. at 4. The Claimant's counsel was awarded the above fee based on 39.4 hours at a rate of $125.00 per hour. In its March 2, 1999, objections, the Employer argues that attorneys fees should be based on 23.2 hours at a rate of $100.00 per hour, for a total of $2,320.00.

Section 702.132 of the regulations provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done and shall take into account:

(1) the quality of representation;

(2) the complexity of the legal issues involved; and

(3) the amount of benefits awarded.

20 C.F.R. §§ 702.132. *See also: Brown v. Marine Terminal Corp.*, 30 BRBS 29 (1996)(en banc) *Watkins v. Ingalls Shipbuilding*, 26 BRBS 179 (1993) (amount of benefits only one factor considered); *Snowden v. Ingalls Shipbuilding*, 25 BRBS 245 (1991) *aff'd on recon.*, 25 BRBS 346 (1992) ("requested fee reasonably commensurate with necessary work done"); *Mikell v. Savannah*

Shipyard Co., 24 BRBS 100 (1990); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

The Fifth Circuit has articulated twelve additional factors to be considered when evaluating a request for attorney fees:

(1) the time and labor required;
(2) the novelty and difficulty in the questions;
(3) the skill required to perform the services properly;
(4) the preclusion of other employment by the attorney to acceptance of the case;
(5) the customary fees;
(6) whether the fee is fixed or contingent;
(7) the time limitations imposed by the client or other circumstances;
(8) the amount involved;
(9) the experience, reputations and abilities of the attorneys;
(10) the undesirability of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

See Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). *See also Presley v. Tinsley Maintenance Servs.*, 529 F.2d 433 (5th Cir. 1976).

The Employer avers that pursuant to *Johnson*, the Claimant's counsel's requested fee is exorbitant for two reasons. First, the Employer argues that the hourly rate of $125.00 per hour is not the prevailing rate in Biloxi, Mississippi. The Employer further insists that the requested hourly rate does not reflect counsel's experience in Longshore and Harbor Worker's Compensation Act. Therefore, the Employer asserts that it is unreasonable to award the Claimant's counsel the requested hourly rate of $125.00.

Where the Employer makes general allegations that a fee is excessive or unreasonable, without challenging specific findings or providing support for the allegation, it fails to meet the burden of proving that the fee is unreasonable. *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Forlong v. American Sec. & Trust Co.*, 21 BRBS 155 (1988); *Le Batard v. Ingalls Shipbuilding Div., Litton Sys.*, 10 BRBS 317 (1979) (employer's mere assertion that rate is not a customary local rate is insufficient). *See also Mijangos v. Avondale Shipyards*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941 (5th Cir. 1991). Although the Employer implies that Claimant's counsel lacks experience in this area of law, the Employer fails to provide evidence to support this allegations. Furthermore, the Employer offers no more than conclusive statements declaring that the prevailing rates in Mobile, New Orleans, and Atlanta are not the prevailing rates in Biloxi. (Emp. Brief of 3/2/99 at 1). The Employer included in its brief a decision in which Administrative Law Judge A.A. Simpson stated that geographic region affects the determination of attorney fees awarded, and that "experienced

attorneys may be awarded in Atlanta, Mobile, or New Orleans would be the same necessarily as those in Pascagula." (Emp. Brief of 3/2/99 at 1, *citing William B. Cox v. Ingalls*, Case No. 88-LHC-3335 (September 5, 1991). While this may be true of Pascagula's rates in 1991, the Employer offers no substantive connection between Judge Simpson's 1991 findings and the rate presently at issue. Therefore, absent evidence to the contrary, I find that the hourly rate of $125.00 is reasonable.

Second, the Employer argues that counsel's statement of services rendered is riddled with incorrect dates, thereby rendering the application for attorney fees insufficient for the determination of what is a reasonable attorney fee. (Emp. Brief of 3/2/99 at 2-6). Furthermore, the Employer insists that at least one charge is not related to furthering the Claimant's case for entitlement. Accordingly, the Employer avers that the Claimant's counsel should be compensated for 23.2 hours instead of the 39.4 hours claimed.

The Employer challenges the dates listed for various work for which the Claimant's counsel is seeking compensation. My review of the record establishes that it was impossible for counsel to have rendered the listed services on the dates stated for at least 5.7 hours of charges. For example, counsel states in his application that on June 5, 1998, he reviewed a letter from the Employer's counsel for 0.1 hours. However, as the Employer correctly points out, that letter was drafted and sent via regular mail by the Employer's counsel on June 5, 1998. As this letter surely did not arrive on the same day that it was drafted and mailed, this charge is not compensable. This same reconstruction of charges is committed again with regard to charges made on the following dates: June 24, 1998 (0.1 hours for receipt and review of letter drafted and mailed the same day); July 9, 1998 (0.5 hours for receipt and review of vocational rehabilitation report drafted and mailed the same day); August 5, 1998 (1.8 hours for preparation of exhibit list that was already delivered to opposing counsel on July 31, 1998); August 7, 1998 (0.8 hours for preparation of exhibit list that was already delivered to opposing counsel on July 31, 1998); October 14, 1998 (1.2 hours for receipt and review of the Employers brief that had yet to be exchanged with counsel; and January 26, 1999 (1.2 hours for receipt and review of ALJ decision that was issued and mailed via regular mail from Jacksonville, Florida, on the same day). It is apparent that in amending his application for attorneys fees to provide dates on which necessary services were provided to the Claimant, counsel has reviewed the file and listed the dates appearing on the documents in the file instead of providing an accurate record of when services were actually rendered. Therefore, counsel will not be compensated for the aforementioned 5.7 hours for which he failed to provide accurate dates of services rendered.

The Employer avers that counsel claimed an excessive amount of time for the drafting of a post-hearing brief as well as a response to a motion to correct. Counsel charged 23 hours for the preparation of the brief, whereas the Employer argues that it is unreasonable for more than 15 hours to be charged. Similarly, the Employer insists that counsel charged 1.4 hours for the drafting of a one sentence letter in response to Employer's Motion to Correct. In considering the length and complexity of the post-hearing brief that the Claimant's counsel prepared, I find that the charge of 23 hours is not unreasonable. I do, however, find that the charge of 1.4 hours for the drafting of a one sentence letter to be wholly unreasonable. Therefore, I will reduce the charge from 1.4 hours to 0.1 hours.

The Employer specifically complains that Claimant's counsel should not be compensated for the one hour meeting with the Claimant conducted two days after the hearing. (Emp. Brief of 3/2/99 at 4). The Employer reasons that this post-hearing conference with the Claimant has no bearing on, nor does it help to, establish entitlement. An attorney is entitled to compensation for all necessary work performed. The proper test for determining if the attorney's work is necessary is whether at the time the attorney performs the work in question she could reasonably regard the work as necessary to establish entitlement. *See Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981); *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). I find that the one hour charge for the post-hearing conference is proper as one could reasonably regard the meeting as necessary to the proper representation of the Claimant as well as the preparation of the post-hearing brief. Therefore, this charge for 1.0 hours is compensable.

Accordingly, I find that the Claimant's attorney should be compensated for 32.4 hours at the hourly rate of $125.00.

ORDER

It is **HEREBY ORDERED** that Ingalls Shipbuilding, Inc. and its carrier, shall:

1. Pay Claimant compensation for his temporary total disability from August 16, 1995, to November 15, 1996, excluding periods for which he has already been paid, and during which he attempted to work for the Employer. The specific computations of the compensation award shall be administratively performed by the District Director.

2. Pay Claimant compensation for his permanent, total disability from November 16, 1996 to February 11, 1997, excluding periods for which he has already been paid. The specific computations of the compensation award shall be administratively performed by the District Director.

3. Pay Claimant compensation for his permanent, partial disability for the period commencing on February 12, 1997, in the amount of 18% of his average weekly wage of $455.95, per week, excluding periods for which he has already been paid. The specific computations of the compensation award shall be administratively performed by the District Director.

4. Pay interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director for all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 91984). The specific computations of the compensation award shall be administratively performed by the District Director.

5. Pay to the Claimant's attorney, John G. McDonnell, Esquire, the sum of $4,050.00 for attorney fees.

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Ainsworth H. Brown
Administrative Law Judge